Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

PHONECARDS R US, INC. AND R.L. JORDAN OIL COMPANY OF NORTH CAROLINA, INC.,

Petitioners,

v.

STATE OF SOUTH CAROLINA AND SOUTH CAROLINA LAW ENFORCEMENT DIVISION,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State violates a private party's right to Equal Protection as afforded by the United States Constitution where the State declares unlawful, pursuant to a state slot machine statute, a vending machine that dispenses a prepaid long distance telephone card with a sweepstakes game piece attached, notwithstanding that other sweepstakes are allowed to operate in the State?

2. Whether the court below erred in holding that the phone cards and dispensers fail to satisfy the requirements of S.C. Code Ann. § 61-4-580, which allow sweepstakes where offered in connection with a consumer service and no purchase is necessary, notwithstanding that the phone cards and dispensers satisfy the literal terms of the statute, and whether the Petitioners' Equal Protection rights are violated by this application of the statute?

PARTIES TO THE PROCEEDING

Petitioner Phonecards R Us, Inc. is the owner of prepaid long-distance telephone cards which it sold from convenience store locations owned by Petitioner R.L. Jordan Oil Company of North Carolina, Inc. The phone cards were dispensed by vending machines owned by DTL Companies, Inc., which was a party to the proceedings in the trial court, but is not a party to this Petition. DTL Companies, Inc. leased the vending machines to Phonecards R Us, Inc. Sun Light Prepaid Phonecard Co., Inc., also owned phone cards and leased vending machines from DTL Companies, Inc. Like DTL, Sun Light was also a party to the proceedings in the trial court, but is not a party to this Petition. Petitioners Phonecards R Us, Inc. and R.L. Jordan Oil Company of North Carolina, Inc. are corporations in good standing under the laws of the states of South Carolina and North Carolina, respectively, and both hereby declare, pursuant to Rule 29.6 of this Court, that neither of these corporations have parent companies or any wholly owned subsidiaries. Petitioners were appellants in the South Carolina Supreme Court and plaintiffs in the trial court. The respondents, State of South Carolina and South Carolina Law Enforcement Division, were respondents in the South Carolina Supreme Court and defendants in the trial court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Phonecards R Us, Inc. and R.L. Jordan Oil Company of North Carolina, Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court from which review is sought is *Sun Light Prepaid Phonecard Co., Inc. v. State of South Carolina*, 360 S.C. 49, 600 S.E.2d 61 (S.C. 2004) (3-2 decision, two justices dissenting).

JURISDICTION

The South Carolina Supreme Court entered its opinion in this case on July 6, 2004, and entered its order denying Petitioners' petition for rehearing on August 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides:

> "Section 1 . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV

Section 12-21-2710 of the South Carolina Code provides:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to . . . vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

S.C. Code Ann. § 12-21-2710

Section 61-4-580 of the South Carolina Code provides:

> No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:

. . .

(3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

S.C. Code Ann. § 61-4-580(3)

STATEMENT OF THE CASE

On February 29, 2000, the South Carolina Attorney General issued his opinion that certain prepaid long-distance telephone cards and phone card dispensers operated by the Petitioner Phonecards R Us, Inc. were illegal pursuant to S.C. Code Ann. § 12-21-2710. On or about March 3, 2000, and for several days thereafter, the South Carolina Law Enforcement Division confiscated the

Petitioner's phone cards and the dispensers in various counties within the State of South Carolina.

The phone card dispensers that are the subject of this action dispense prepaid long-distance telephone cards. For every dollar inserted into the dispenser, the customer will receive a prepaid long-distance telephone card with two (2) minutes of long-distance telephone service. The customer can use the two (2) minutes of long-distance service by dialing a toll free number and entering a "PIN" number displayed on the card. The customer also has the opportunity to "recharge" the card to put additional long-distance time on the card at the rate of 14.9 cents per minute.

Attached to each phone card is a promotional game piece that gives the customer an opportunity to win a cash prize. If the game piece contains symbols arranged in a certain order, for example, three in a row, the customer may win a prize. The prizes are paid to the winning customer either by the cashier in the store or by mail, but not by the dispenser itself. The phone cards, including the promotional game pieces, are pre-printed by the manufacturer before they are placed in a phone card dispenser. A customer does not need to purchase a phone card to obtain a free game piece. The customer may obtain a free game piece, without the payment of any money, from the operator of the dispenser by mail.

In order to purchase a phone card from the phone card dispenser, the customer inserts a dollar (or some larger denomination if the customer wants to purchase more than one phone card). The customer then presses a button on the dispenser, marked "dispense," and a phone card drops into a tray on the front of the dispenser. Located inside the machine is a roll of phone cards. When the

customer presses the "dispense" button, a single phone card is rolled off of the roll, and a cutter detaches the phone card from the remainder of the roll. At the same time, a bar code scanner scans the bar code on the back of the phone card. This bar code contains the information from the promotional game piece attached to the phone card. The bar code scanner allows the video monitor on the front of the dispenser to display the same image that appears on the promotional game piece. In other words, the dispenser "reads" the game piece as it is being dispensed. The customer may look at the video monitor or the game piece, itself, to determine whether he or she has a winning game piece.

The phone card dispenser plays no role in determining whether the customer has won a prize. The phone card dispenser does not contain a random number generator or any other mechanism that would allow the dispenser to determine whether the customer will win. The dispenser simply dispenses the pre-printed phone cards and displays on the monitor the contents of the game piece.

Posted on the side of each phone card dispenser is a notice providing rules of the sweepstakes, including rules on free participation. This notice clearly indicates that no purchase is necessary. Furthermore, the video monitor on the phone card dispenser also provides the rules of the sweepstakes and clearly states that no purchase is necessary.

The Petitioners first raised their Equal Protection argument in their pleadings, and then again in their brief that was presented to the trial judge and opposing counsel at the beginning of the bench trial on July 2, 2001. In this brief, the Petitioners argued that "[t]o enforce § 12-21-2710 in such a way as to treat the Phone Card Dispensers

as illegal but all other vending machines as legal clearly violates the Defendant's right to Equal Protection of the law as afforded by the United States and South Carolina Constitutions." At the conclusion of the trial, the judge stated that he would allow the parties to make "whatever arguments [they] want to make, [and] to supplement the record with whatever you want to supplement it with. . . . I'm going to hear everything; I'm going to consider everything." The trial judge clearly had Petitioners' Equal Protection arguments before him when making his decision. However, when the trial judge's initial order failed to directly rule on the Equal Protection argument, Petitioners again raised the issue by way of a SCRCP 59(e) motion to alter, amend or reconsider. Finally, the South Carolina Supreme Court ruled on the Equal Protection issues in its decision in this case.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law that should be addressed by this Court in order to provide the States with instruction on how to promulgate and enforce gambling laws in a way that does not run afoul of the Constitutional guarantee of Equal Protection. As evidenced by the record in this case, there are many companies that market consumer goods and services on a national level by conducting sweepstakes. M&M's candies, McDonald's restaurants and others promote their products by offering prizes through various sweepstakes-style contests. These sweepstakes typically involve scratch-off or peel-off game pieces attached to cups or other product containers. With regard to M&M's and other products frequently sold from vending machines, the game pieces

are often found on the inside of the product wrapper or container.

In South Carolina, the state slot-machine statute proscribes, among other things, vending machines pertaining to games of chance, except for "vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance." S.C. Code Ann. § 12-21-2710. If one reads this statute literally, one could reasonably come to the conclusion that all vending machines that dispense candy or snacks with sweepstakes promotions are illegal. Nonetheless, in this case the South Carolina Supreme Court and the state law enforcement agencies have given tacit approval to such types of sweepstakes promotions. In its decision, the South Carolina Supreme Court suggests that these vending machines are legal because they "dispense promotional game products that are *legitimate* because their companies are attempting to promote the sale of those products." *Sun Light Prepaid Phonecard Co., Inc. v. State of South Carolina*, 360 S.C. 49, 600 S.E.2d 61 (S.C. 2004) (emphasis added). In contrast, the majority of the court found the phone card dispensers at issue in this case to be illegal, arguing that the sweepstakes promotion is not "legitimate" and the consumer is actually purchasing a game of chance, rather than the long-distance phone service.

In this case, the State Law Enforcement Division, which originally confiscated the phone cards and dispensers, the trial court, and a majority of the justices of the South Carolina Supreme Court all applied the same statute to reach the conclusion that the phone card dispensers are illegal, while other vending machines are legal, notwithstanding that all such vending machines

technically contain an element of chance. In the same manner, other states appear to have allowed M&M's and McDonald's to carry on with their promotional sweepstakes, while continuing to prohibit sweepstakes promotions that seem less politically palatable. *See, e.g., Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234 (N.D. 2001); *Mississippi Gaming Commission v. Six Electronic Video Gambling Devices*, 792 So.2d 321 (Miss. App. 2001) (both holding that similar vending machines selling phone cards with sweepstakes game piece attached were illegal under state law, despite comparison to other, apparently legal, promotional sweepstakes); *but see also* Kansas Att'y Gen. Op. 97-26 (concluding that Lucky Shamrock phone card dispenser is legal under Kansas law); *Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So.2d 936 (Miss. 1997) (holding phone cards with sweepstakes attached are legal under Mississippi law).

In South Carolina, and in other states, courts have held the phone card sweepstakes illegal, while recognizing other promotional sweepstakes as legal. This disparate treatment of sweepstakes contests that would appear to be similarly situated has deprived the owners of the phone cards their constitutionally protected right to Equal Protection. This case affords the Court the opportunity to articulate circumstances under which, if any, a State may prohibit one sweepstakes while allowing another, or to establish that a State that attempts to draw distinctions between various sweepstakes, where no relevant distinctions exist, violates Equal Protection.

I. The Important Constitutional Issue of Whether a State Violates a Private Party's Right to Equal Protection as Afforded by the United States Constitution Where the State Declares Unlawful, Pursuant to a State Slot Machine Statute, a Vending Machine that Dispenses a Prepaid Long Distance Telephone Card with a Sweepstakes Game Piece Attached, Notwithstanding That Other Sweepstakes Are Allowed to Operate in the State.

The phone card dispensers have been held to violate the state slot-machine statute, S.C. Code Ann. § 12-21-2710, because of the promotional game pieces that are attached to the phone cards, which give the customer a chance to win a prize. Although the dispenser itself does not contain an element of chance, it dispenses a phone card with a game piece that does contain an element of chance. In the same manner, all vending machines in South Carolina, or in the nation, that dispense candy or snacks with promotional sweepstakes game pieces would violate this statute or similar statutes.

Therefore, in the present case, there should be two possible outcomes: (1) both the phone card dispensers and the traditional vending machines (which dispense candy and snacks) are legal, because they are constructed in manner to give a uniform return, and because they do not play any role in determining whether the customer has won a prize, or (2) both the phone card dispensers and the other vending machines (and all other similarly situated vending machines) are illegal because they dispense a product with a promotional sweepstakes game piece attached. Because § 12-21-2710 is a penal statute and must be strictly construed against the State, both types of vending machines should be declared legal. Further,

construing § 12-21-2710 and § 61-4-580 (discussed below) *in pari materia* requires a finding that the dispensers are legal. However, the South Carolina Supreme Court has held, by a 3-2 decision, that the phone cards and dispensers are illegal, while implying that the other types of vending machines are legal. Consequently, the court's decision violates the Petitioners' Equal Protection rights under the United States Constitution.

"Equal protection is satisfied if 1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis." *Whaley v. Dorchester County Zoning Board of Appeals*, 337 S.C. 568, 575-76, 524 S.E.2d 404, 408 (1999); see also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") In the present case, the phone card dispensers and candy and snack vending machines should be considered members of the same class – they are all vending machines that have been constructed to provide the same uniform return (i.e. a product) every time the purchase price is inserted. There is no element of chance built in to any of these machines. They operate in the same manner each and every time. The only element of chance associated with the machines is a sweepstakes game piece attached to the product dispensed by the machine.

The State has apparently taken no action against any candy or snack vending machines that offer sweepstakes game pieces along with the product. (Answers to Interrogatories dated October 20, 2000). The court below

appears to acknowledge that a sweepstakes promotion pertaining to such products as soft drinks, candy and fast-food are legal, by contrasting these games with the phone card promotion. However, none of the distinctions cited by the trial court, including odds of winning, duration of the sweepstakes, etc., are relevant to an analysis under § 12-21-2710. The statute itself does not reference any of these factors. To enforce § 12-21-2710 in such a way as to treat the phone card dispensers as illegal but all other vending machines as legal results in different treatment for members of the same class and, consequently, violates Equal Protection. Alternatively, the phone card dispensers and other vending machines have been assigned to different classes without any rational basis for this distinction.

Insofar as the South Carolina Supreme Court's opinion appears to recognize the legality of soft drink, candy and fast food sweepstakes, this case involves a traditional Equal Protection violation. If, however, the soft drink, candy and fast food sweepstakes, and the vending machines that sell them, were also considered illegal, then this case would present a violation of Equal Protection by selective prosecution. It does not appear that the State has attempted to challenge the legality of any soft drink, candy or fast food sweepstakes. If the State has only chosen to challenge the phone cards and dispensers, it is logical to assume that these items were originally seized because of the appearance of the video display on the dispensers. Since there is no law in South Carolina, to the Petitioners' knowledge, that would proscribe the visual display on the phone card dispenser, the State's seizure of these machines appears to have been improperly motivated by Petitioners' attempt to exercise its rights to commercial free speech in the promotion of this product. This type of

selective prosecution is violative of Equal Protection. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) ("To establish selective prosecution, a defendant must satisfy a two-prong test. First, a defendant must show 'he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted.' Second, 'the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech.'"); *see also Oyler v. Boles*, 368 U.S. 448 (1962) (selective enforcement not violative of equal protection unless selection "deliberately based upon unjustifiable standard" or "arbitrary classification").

II. The Important State Law Issue of Whether the Court Below Erred in Holding That the Phone Cards and Dispensers Fail to Satisfy the Requirements of S.C. Code Ann. § 61-4-580, Which Allow Sweepstakes Where Offered in Connection With a Consumer Service and No Purchase Is Necessary, Notwithstanding That the Phone Cards and Dispensers Satisfy the Literal Terms of the Statute, and the Important Equal Protection Concerns Raised by the Court's Decision on That Issue.

S.C. Code Ann. § 61-4-580 lists certain activities that may not be conducted on a premises licensed for the sale of beer and wine. Subparagraph (3) of § 61-4-580 provides that, generally, a beer and wine retailer may not "permit gambling or games of chance" on the premises. However, effective June 1, 1999, subparagraph (3) was amended to add an exception for games of chance in which (1) the game is conducted in

connection with the promotion of a consumer good or service, (2) no purchase is necessary and (3) the rules for free participation are clearly displayed. Thus, § 61-4-580 specifically authorizes "games of chance" and "sweepstakes" where the three requirements of the statute are met.

As a preliminary matter, all of the locations where the phone card dispensers were located in this case held permits to sell beer and wine, clearly bringing the phone card promotion within the purview of the statute. The game pieces attached to each phone card are offered in connection with a consumer service, i.e. prepaid long-distance telephone service. A customer is not required to purchase a phone card or to pay anything in order to obtain a free game piece. Finally, both the video monitor and the notice posted on each phone card dispenser clearly indicate that no purchase is necessary to obtain a free game piece and provide instructions on free participation. Therefore, the phone cards are legal pursuant to § 61-4-580.

In the South Carolina Supreme Court's majority decision in this case, the court simply states that "the phone cards and dispensers do not meet the requirements of § 61-4-580 because the game pieces are not a legitimate promotion or sweepstakes." *Sun Light Prepaid Phonecard Co., Inc. v. State of South Carolina*, 360 S.C. 49, 600 S.E.2d 61 (S.C. 2004). The court gives no further analysis to explain how it can reach this conclusion in spite of the literal language of the statute. In the trial court's order, the court held that the availability of a free game piece "does not convert an illegal gambling device into a legal device," suggesting that the free game piece is of no legal significance. The court disregards the fact that the availability of a free game piece is a specific element under the sweepstakes exception to § 61-4-580. In fact, it is somewhat telling that the trial court's order makes

no mention at all of § 61-4-580. The free game piece available through the phone card promotion is one of the critical elements that renders the phone cards legal.

The South Carolina Supreme Court's 3-2 decision on this state law issue raises important constitutional implications. If the State can apply the same statute to two different vending machines, both of which satisfy the literal terms of the statute, and find one legal but the other illegal, then Equal Protection concerns are once again raised. In this case, the South Carolina Supreme Court, rather than applying the terms of the statute to the phone card promotion, simply concludes that the statute does not apply because the phone card promotion is not "legitimate." The majority below has gone outside of the parameters of the statute and has injected its own subjective opinion into this legal analysis. The State's conduct in this case, as approved by the majority decision of the South Carolina Supreme Court, has denied Petitioners' right to Equal Protection, by refusing to apply the statute to the phone cards promotion in the same manner it would be applied to any other sweepstakes.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 16, 2004

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sun Light Prepaid Phonecard Co., Inc., and DTL Companies, Inc., Plaintiffs,

v.

State of South Carolina and South Carolina Law Enforcement Division, Defendants.

Phonecards R Us, Inc., R.L. Jordan Oil Company of North Carolina, Inc. and DTL Companies, Inc., Plaintiffs,

v.

State of South Carolina and South Carolina Law Enforcement Division, Defendants,

Of Whom Phonecards R Us, Inc., and R.L. Jordan Oil Company of North Carolina, Inc. are Appellants,

And State of South Carolina and South Carolina Law Enforcement Division are Respondents.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 25840
Heard February 4, 2004 – Filed July 6, 2004

AFFIRMED

Matthew A. Henderson and Joshua M. Henderson, of Henderson, Brandt & Vieth, of Spartanburg, for appellants.

Assistant Attorney General Elizabeth R. McMahon, of Columbia; William H. Davidson, II, and Andrew Lindemann, of Davidson, Morrison, and Lindemann, P.A., of Columbia, for respondents.

W. Hogan Brown, Carl W. Stent, and David M. Barden, all of Columbia, for Amicus Curiae.

JUSTICE MOORE: We are asked to determine whether the trial court erred by finding certain long distance telephone cards and electronic phone card dispensers to be illegal gambling devices. We affirm.

PROCEDURAL FACTS

Appellants commenced this action following respondents' (the State's) seizure of appellants' pre-paid, long distance telephone cards (phone cards) and electronic phone card dispensers. Appellants sought the return of the phone cards and dispensers and damages resulting from the seizure. Before hearing the claim for damages, a trial was first held on the declaratory judgment claim to determine the legality of the phone cards and dispensers.[1] The

[1] By order of this Court, all magistrate court cases and appeals therefrom arising out of the seizures of the phone card machines and phone cards were stayed pending the conclusion of this action.

trial court held the phone cards and dispensers were illegal gambling devices.

FACTS

The phone card dispensers, which are entitled "Lucky Shamrock," were manufactured by Diamond Games Enterprises and distributed and leased by DTL Companies, Inc. to appellants. The promotional materials furnished by the manufacturer and distributor contain a header in large print stating, "Pay Winners in Cash Legally." On this same page, the promotion contains the sentence, "Audio and Visual Effects Make It Look Like a Slot Machine Although It's Not!" The promotional information mentions the sale of the phone cards in the following way: "Sell Hundreds of Phone Cards Every Day Reaping Big Profits!"

The phone cards, including the game pieces, are preprinted by the manufacturer before they are placed in a dispenser. The cards are printed on rolls containing 7,500 cards. Attached to each phone card is a game piece that gives the customer a chance to win a cash prize. The entire card contains a paper cover, which, when pulled back, reveals a toll-free number and pin number for activating the phone service as well as an array of nine symbols in a 8-liner format.[2] If the game piece contains symbols arranged in a certain order, the customer wins a prize. The computer that prints the card randomly generates winners on the cards. Seventy percent of the revenue from the

[2] Appellants' expert agreed that if the card included only the game portion of the card and did not include the phone card, the card would be a pull-tab, which is a gambling device.

cards is paid out in prizes and the rest is a hold percentage.[3] A hold percentage is the net profit received by the sellers of the cards. The dispensers do not adjust to ensure the hold percentage is received; however, the amount of the hold percentage is predetermined based on the printing of the phone card rolls.

After printing, the roll of pre-printed phone cards are placed inside the dispenser and the dispenser cannot work without a roll of phone cards inside.[4] Each card sells for $1 and gives the customer two minutes of long distance telephone service. The customer can use the two minutes of time by dialing a toll-free number and entering a PIN number. The customer can also recharge the card and put additional long distance time on the card at the rate of 14.9 cents per minute.

Appellants contend the purpose of the game piece is to promote the sale of the phone cards. The prizes are paid to the winning customer either by the cashier in the store or by mail, but not by the dispenser itself. A customer does not need to purchase a phone card to obtain a free game piece. A free game piece could be obtained from the operator of the dispenser by mail. Instructions on how to obtain a free game piece were posted on the side of the machine and on the video screen of the machine.

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[3] Sun Light Prepaid Phonecard Company's (Sun Light) promotion was predicted to result in $9,744,000 in prizes and $4,178,000 in net revenue.

[4] Donald Louden, who was involved in the design and building of the machines, testified the phone cards could be purchased from a clerk and did not have to be dispensed by the machines.

The phone card dispensers are housed within a standard slot machine cabinet. The dispensers contained several features present in a gambling machine as opposed to a vending machine that simply dispenses a product: (1) the dispensers contain a video screen that has a gambling theme in that, if the user so chooses, the user can see reels turn as if the winner is chosen by the machine;[5] (2) if the machine dispenses a winning game piece, celebration music is played, whereas no music plays if the game piece is a loser; (3) the machine has a lock-out feature which freezes the operation of the machine when a pre-determined level of prize money is reached; (4) the machine contains two hard meters, one is an in-meter that records the amount of money going into the machine, and the other is labelled "WON" and records the value of the prizes issued by the machines; (5) the machine, although it accepts $1, $5, $10, $20, $50, and $100 bills, does not have a mechanism for returning change; and (6) the machines could be linked, a feature of a gambling device.

Further, although the sweepstakes promotion was set to run for 22 months, the long distance service on the phone cards was valid only for six months from the time the *first* phone card pin number was used. There was testimony that appellants, the manufacturer, and the distributor did not keep any records of the phone time used or what pin numbers had been sold via the cards. Also, some stores contained more than one phone card

[5] The machine does not play a role in determining the winner because the winning cards have already been pre-selected on the phone card rolls. The machine simply reads the bar code on the back of the phone card and displays that image on the video screen. The customer can either look at the game piece or the monitor to determine if they have a winning game piece.

dispenser. According to the lease and purchase agreements, Phonecards R Us, Sun Light, and another company not involved in this case, were under contract to sell 117 million and 360 thousand (117,360,000) cards a year in the state of South Carolina. The South Carolina population in early 2000, the time of the seizures, was only about three million people. A marketing study had not been conducted to determine whether there would be such a high demand for the phone cards. Finally, the phone company from which the long distance service was purchased could not legally provide intrastate service in South Carolina because it had not been licensed to do so.

ISSUE

Did the trial court err by finding the phone cards and phone card dispensers are illegal gambling devices?

DISCUSSION

The trial court found the phone cards and phone card dispensers are illegal under S.C.Code Ann. § 12-21-2710 (2000), which provides:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State . . . *any . . . pull board, or other device pertaining to games of chance of whatever name or kind,* including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, *but the provisions of this section do not extend to . . .*

> *vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.*

(Emphasis added).

Appellants argue the phone card dispensers are legal under § 12-21-2710 because they are the same as traditional vending machines and provide a uniform return for every dollar inserted, *i.e.* a phone card. They argue that only when a machine and its components determine who will be a winner does the machine violate § 12-21-2710.

While it is true the dispenser always gives the customer the same return, *i.e.* a phone card with a game piece attached, and that the dispenser does not itself determine whether a customer has won, the dispenser still contains an element of chance.

When printing the phone card rolls, a computer randomly determines which game piece attached to which phone card will be a winner. The phone card roll is then placed inside the dispenser. As testified to by the designer of the dispensers and by appellants' expert, the phone card rolls are an integral part of the machine, and, without them, the dispensers will not work. Therefore, the phone card rolls present the element of chance in the dispensers and cause the cards and the dispensers to violate § 12-21-2710.

Although the phone cards are an integral component of the dispensers, the phone cards would be illegal if they were issued over the counter as opposed to being placed in the dispensers. As the trial court found, § 12-21-2710 declares illegal any pull board or other device pertaining to games of chance. The phone card itself contains an

element of chance and is a type of gambling device known as a pull-tab. Appellants' expert stated that if the card did not include the long distance phone service but only included the sweepstakes portion, the card would be a gambling device. Given the characteristics of the phone cards, the phone portion of the cards is mere surplusage to the game piece. Accordingly, the trial court properly determined the phone cards themselves were illegal gambling devices.

Furthermore, the trial court correctly determined the phone card dispensers are like slot machines and not traditional vending machines. The dispensers have a gambling-themed video screen, play celebration music when a customer is a winner, have a lock-out feature which freezes the operation of the machine when a predetermined level of prize money is reached, contain a meter that records the value of the prizes paid out, and do not give change. None of these features is present in a traditional vending machine that is exempted from § 12-21-2710.

Accordingly, the trial court properly found the phone cards and dispensers to be illegal gambling devices pursuant to § 12-21-2710.[6]

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[6] Appellants argue that if the dispensers are found illegal under § 12-21-2710, then all vending machines in South Carolina that dispense candy or snacks with promotional sweepstakes game pieces likewise violate the statute, otherwise their equal protection rights would be violated. However, this argument is without merit given the phone card dispensers are illegal gambling devices and vending machines are not. The two machines are *not* similarly situated such that an equal protection claim may arise. *See Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999) (equal protection is satisfied if: (1) classification bears reasonable

(Continued on following page)

Appellants further argue the trial court should have found the dispensers and phone cards legal pursuant to S.C.Code Ann. § 61-4-580 (Supp.2003).[7] However, the phone cards and dispensers do not meet the requirements of § 61-4-580 because the game pieces are not a legitimate promotion or sweepstakes. Accordingly, the trial court did

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relation to legislative purpose sought to be effected; (2) members of class are treated alike under similar circumstances and conditions; and (3) classification rests on some reasonable basis).

The main difference between the dispensers and vending machines is that the vending machines dispense promotional game products that are legitimate because their companies are attempting to promote the sale of those products. The phone card dispensers, on the other hand, do not issue game pieces that are part of a legitimate promotion or sweepstakes. The product being sold to consumers is not the long distance phone service but a game of chance.

[7] Section 61-4-580 provides:

> No holder of a permit authorizing the sale of beer or wine . . . may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:
>
> . . .
>
> (3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
>
> (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
>
> (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
>
> (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

not err by failing to find the dispensers and phone cards legal pursuant to § 61-4-580.[8]

CONCLUSION

We find the trial court did not err by finding the two-minute emergency long-distance phone cards and the electronic phone card dispensers to be illegal gambling devices under § 12-21-2710.

AFFIRMED.

TOAL, C.J., and Acting Justice ALEXANDER S. MACAULAY, concur. PLEICONES, J., and Acting Justice DANIEL F. PIEPER dissenting-in separate opinions.

JUSTICE PLEICONES: I agree with the majority that the machines in question are gambling devices that violate S.C.Code Ann. § 12-21-2710 (2000), but would hold they meet the exception found in S.C.Code Ann. § 61-4-580(3) (Supp.2003). Accordingly, I would reverse the circuit court's order.

In 1929, this Court held a machine that dispensed a package of mints for each nickel deposited, and in addition dispensed, at random intervals, between 2 and 20 brass tokens, was an unlawful gambling device under the

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[8] Given the phone cards and dispensers are illegal under § 12-21-2710, it is unnecessary to address appellants' argument that the trial court erred by finding the dispensers illegal under S.C.Code Ann. § 12-22-1040 (2000).

predecessor to § 12-21-2710.[9] *Harvie v. Heise,* 150 S.C. 277, 148 S.E. 66 (1929). In my opinion, that decision controls the gambling device issue raised here.

Having determined that the dispenser/phone card/game piece scheme here is a gambling device, the next issue is whether it is permitted under § 61-4-580. The General Assembly has legalized games of chances "in connection with the sale, promotion or advertisement of a consumer good or service . . ." if conducted on premises licensed for the sale of beer or wine. § 61-4-580(3). The majority concludes that the phone cards and dispensing machines are without this statute because "the game pieces are not a legitimate promotion or sweepstakes." While I agree that the phone cards are a foolish investment, I do not believe the statute limits promotions or sweepstakes to those where the consumer good or product that is the subject of the promotion is deemed by a court to be "legitimate" or a "good deal." As neither the wisdom nor the legitimacy of the promotion is an issue, I can find no

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[9] This gambling device statute has been amended over the years as the technology evolved, but the essential structure has remained intact. The version in effect in 1929 read:

> It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State, any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance. Any person whomsoever who shall violate this section shall be subject to a fine of not more than one hundred dollars, or imprisonment upon the public works of the County wherein the offense is committed for a period of not more than thirty days.
>
> 2 S.C.Code § 196 (1922).

basis to deny these machines and cards the exemption provided by the statute.

I would reverse the decision of the circuit court, and hold that these devices are within the ambit of § 61-4-580(3), and thus are legal when placed in licensed premises.[10]

ACTING JUSTICE PIEPER: I concur with Justice Pleicones' opinion as to the interpretation of S.C.Code § 12-21-2710 and strict construction of § 61-4-580. However, since the record is not clear and since the trial court declined to address § 61-4-580, I would first remand for a hearing to determine whether the appellants held a permit and allowed the placement of these machines upon licensed premises in accordance with § 61-4-580. If the trial court finds upon remand that the permit and licensed premises requirements have been met, I would reverse and hold that the devises are legal pursuant to § 61-4-580(3).

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[10] It is unclear from the record whether any of appellants are licensed premises within the meaning of § 61-4-580.

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF**
	)	**COMMON PLEAS**
COUNTY OF RICHLAND	)	
Sun Light Prepaid Phonecard Co., Inc., and DTL Companies, Inc., Plaintiffs,	)	Civil Action No. 00-CP-40-1559
v.	)	ORDER
State of South Carolina and South Carolina Law Enforcement Division, Defendants.	)	(Filed Jan. 8, 2002)
Phonecards R Us, Inc., R.L. Jordan Oil Company of North Carolina, Inc. and DTL Companies, Inc., Plaintiffs,	)	Civil Action No. 00-CP-40-1583
v.	)	
State of South Carolina and South Carolina Law Enforcement Division Defendants.	)	

This matter is before this Court in accordance with the order issued by the South Carolina Supreme Court dated June, 21, 2000. This litigation originated with the seizure by the South Carolina Law Enforcement Division (SLED) of phonecard machines and rolls of phonecards in the possession of the Plaintiffs, Sunlight Prepaid Phonecard Company, Inc. ("Sunlight"), Phonecards R Us, Inc.,

and R.L. Jordan Oil Company of North Carolina, Inc.[1] The Plaintiffs challenged the seizures and have defended the legality of the phonecard machines and the rolls of phonecards.

In accordance with procedures set forth in S.C. Code Ann. § 12-21-2712, the Plaintiffs had the right to challenge orders of destruction for the seized items. In addition to defending the legality of the seized items at the magistrate's court level, Sunlight and Phonecards commenced these civil actions in the Court of Common Pleas for Richland County seeking, among other claims, a declaratory judgment that the phonecard machines and the rolls of phonecards are legal under South Carolina law.

In recognition that the parties were compelled to litigate forfeiture actions in magistrate's courts throughout the State as well as these two civil actions, the parties jointly sought relief from the South Carolina Supreme Court in its original jurisdiction. By order dated June 21, 2000, the Supreme Court has ordered the stay of all magistrate court cases and appeals therefrom arising out of the seizures of the phonecard machines and rolls of phonecards at issue. The Supreme Court further ordered that the Fifth Judicial Circuit had statewide, jurisdiction "to make uniform rulings and dispose of all questions concerning the legality or illegality of the devices which are the subject of these proceedings."

In accordance with that order of the Supreme Court, the parties engaged in pre-trial discovery directed solely at

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[1] Phonecards R Us, Inc. and R.L. Jordan Oil Company of North Carolina, Inc. will be referred to jointly as "Phonecards" throughout this order.

the issue as to whether the seized phonecard machines and the rolls of phonecards are legal or illegal under South Carolina law. On July 2, 2001, an evidentiary hearing was commenced before this Court to determine that sole issue.

After careful consideration of all evidence, including the testimony of lay and expert witnesses, deposition excerpts, and exhibits, as well as the legal arguments presented by the parties both orally and in writing, this Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The phonecard machines were manufactured by Diamond Game Enterprises ("Diamond Games") and were distributed and leased by Dusty Trials Locators Companies, Inc. ("DTL") to Sunlight and Phonecards.[2]

2. The promotional materials furnished by Diamond Games and DTL contain a header in large print stating "Pay Winners in Cash Legally." The same materials further state: "Audio and Visual Effects Make [sic] Look Like A Slot Machine Although It's Not!" (Defendants' Ex. 2). The promotional information makes only the most cursory mention of the sale of phonecards: "Sell Hundreds of Phone Cards Every Day Reaping Big Profits." (Defendants' Ex. 2).

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[2] As the owners of the phonecard machines at issue, DTL was added as a necessary party-plaintiff in this litigation. Prior to the commencement of the evidentiary hearing on July 2, 2001, DTL's counsel informed the Court that DTL did not intend to participate in the hearing and agreed to be bound by the decision of this Court.

3. The phonecard machines are coin-operated machines contained in a traditional slot machine or gaming cabinet. (Tr. 270-271). Each machine was identical, containing a video screen, microprocessor, bar-code reader, bill-acceptor, and a roll of pre-printed phonecards.

4. The phonecards machines include a bill-acceptor for the receipt of currency into the machine. The insertion of money was necessary to operate or play the machine. The Sunlight machine in evidence accepted $1, $5, and $10 bills. The Phonecards machine in evidence accepted $1, $5, $10, $20, $50, and $100 bills. (Tr. 268-269). There was no mechanism for the return of change. The machines did not return any change. (Tr. 269-270).

5. The phonecards sold for $1 each. The video screen contains a counter labeled "Cards Left." When more than $1 was inserted into the machines through the bill-acceptor and as the counter displayed the number of cards purchased, an audio clicking sound was audible counting the "Cards Left" or credits. (Tr. 273). For each "Card Left," the player would press the dispense button, and a phonecard with attached game piece would drop into a tray.

6. Once the dispense button is pressed, the Court observed the audio and visual effects of a traditional slot machine, consistent with the promotion materials furnished by Diamond Games. (Defendants' Ex. 2). There was a spinning of three reels which stopped showing nine symbols in an 8-liner format. The spinning of the reels was accompanied by audio. A player would be able to determine from the video screen and the positioning of the symbols whether that game piece was a winner. The bar-code reader within the machine reads the bar codes on the

back of each pre-printed phonecard to display the appropriate symbols. (Tr. 273-276).

7. Where the game piece contains a winning combination of symbols, the video screen indicates a winner with the illumination of the word "Prize" and the amount of prize money displayed on the screen. In addition, the winning line (of the eight possibilities) is illuminated with a purple over-strike line. Lastly, the winning play is announced by what was described to the Court as "celebration music." A non-winning play was not accompanied by any music. (Tr. 276-278).

8. The phonecard machine requires no skill by the player. The only necessary participation by the player is the insertion of money and the pressing of the dispense button to activate the machine.

9. The phonecard machines were designed and manufactured to simulate a traditional slot machine. From the Court's observations as well as the testimony of lay and expert witnesses, the phonecard machines had the visual appearance of a slot machine or similar gambling device. Additionally, the functioning of the machine, at the very least, simulated that of a traditional slot machine.

10. The phonecard machines leased by Sunlight and Phonecards are identical except for the graphics on the exterior of the cabinet and the bill-acceptor as discussed above. The phonecard machines leased to both companies function in an identical manner and display the same audio and visual effects. (Tr. 270, 310-311)

11. The pre-printed phonecards were also manufactured by Diamond Games and were distributed by DTL to Sunlight and Phonecards. The phonecards are printed by

Diamond Games on rolls containing 7,500 phonecards to which are attached a game piece or sweepstakes ticket. One-half of the card is the actual phonecard, and the other half is the game piece. The card contains the description "Prepaid Two Minute Emergency Phone Card." The entire card contains a paper cover, which when pulled back, reveals a toll-free number and pin number for activating presumably two minutes of long distance phone service as well as an array of nine symbols in an 8-liner format. When the game piece is a winner, the word "Winner" and the prize money won appears on the game piece. Additionally, the ticket includes the phrase, "valid for 6 months." The format and printing of the phonecards of Sunlight and Phonecards are identical, except that the graphics for the two companies is obviously different. (Defendants' Ex. 3, 3-A, 4, 4-A, 12, 12-R).

12. The phonecard machines cannot operate or function without the roll of Phonecards. The roll of phonecards is a necessary and integral component of the machines. (Tr. 152, 280, 311).

13. The phonecard machines do not contain a random-number generator. However, the symbols and the winning combinations on each game piece are determined by means of a computer program during the printing process when the phonecard rolls are actually printed by Diamond Games. The symbols and winning combinations, as well as the positioning of the winning game pieces on a roll, are determined entirely by random. The player of the machines has no control over the outcome and cannot predict or pre-determine the result. (Tr. 281).

14. The phonecard machines include certain components that are common to traditional slot machines or

gambling devices and which are not typically found in vending machines. For instance, the machines include a lock-out or lock-up feature, which freezes the operation of the machine when a pre-determined level of prize money is reached. (Tr. 141). The phonecard machines include two hard meters, one of which records the money inserted into the machine and the other records the money paid out as prize money. (Tr. 292-293). The second hard meter is labeled "WON." (Tr. 294). The machines also include soft meters, which are part of the internal accounting software. The soft meters display the following data entries: cards with prizes dispensed, cards without prizes dispensed, total cards left, dollars in, and prizes won. (Tr. 295). The machines also contain a "locking brain box compartment" which securely houses the microprocessor for the machine. (Tr. 297-298). That is a feature not commonly found in a vending machine. The phonecard machines are also capable of being linked. (Tr. 298-299). These are all features common to slot machines and not vending machines.

15. In the printing of the phonecards, Sunlight and Phonecards were able to set the percentage of net profit, which is also referred to as the "hold" or "house percentage." The "hold" for the phonecards at issue was set at 30%, meaning that 70% of all gross revenue taken in by the machines was returned as prize money. (Tr. 282-284).

16. Both Sunlight and Phonecards sold the two-minute emergency phonecards as part of a sweepstakes promotion. The promotion was not brief or temporary in duration. There was no intent by Sunlight or Phonecards to sell the emergency phonecards without an attached game piece. The phonecards were not printed without the attached game piece. The distribution of game pieces,

therefore, was designed to be continuous throughout the sale of the phonecards.

17. Sunlight's promotion began on February 11, 2000 and was scheduled to end on December 31, 2001. (Defendants' Ex. 5). Phonecards' promotion began on January 19, 2000 and was scheduled to end on November 31, 2001 [sic]. (Defendants' Ex. 6).

18. The "promotion rules" for both Sunlight and Phonecards include the odds of winning the various cash prizes. Sunlight's promotion included the following cash prizes: $1, $5, $10, $50, $100, $1,000, $10,000, $100,000, and $1,000,000. (Defendants' Ex. 5, 10). There were two one million dollar prizes in the promotion and four $100,000 prizes. (Defendants' Ex. 10). Phonecards promotion included the following cash prizes: $1, $5, $10, $50, $100, $500, $1,000, $10,000, and $100,000. (Defendants' Ex. G).

19. The "promotion rules" indicate that no purchase was necessary. Those rules further explain that a free game piece could be obtained from Sunlight and Phonecards. The free game Pieces would have been pulled from a separate roll kept at the company's headquarters. Neither Sunlight nor Phonecards permitted a free play of the machine at its convenience stores. There is no evidence that either Sunlight or Phonecards distributed any free game pieces during their promotions. (Tr. 237-238).

20. A pro forma for Sunlight's promotion was entered into evidence. (Defendant's Ex, 10). That document reflects that the single promotion, which was scheduled to last from February 11, 2000 through December 31, 2001, included 13,920,000 phonecards. The gross revenue, based on the $1 sales price for each ticket, is listed as

$13,920,000. The net revenue is listed as $4,176.000, which represents 30% of the gross revenue. The other 70% or $9,794,000 is designated as prize money to be awarded. No other costs of business, other than the total prize money, are listed in calculating the net revenue.

21. Both Sunlight and Phonecards contracted with DTL for the purchase of four rolls of 7,500 phonecards per roll for each leased machine per month. The contracts were for the year January 1, 2000 through January 1, 2001, which is less than the full scheduled time for each company's promotion. Sunlight and Phonecards, therefore, agreed by contract to purchase and presumably sell 360,000 phonecards per leased machine for that single calendar year. That equates to approximately 1,000 phonecards per machine per day. Neither Sunlight or Phone ands was aware of any marketing survey or study in existence regarding the market for two-minute emergency phonecards in South Carolina. No evidence was presented to demonstrate the demand for emergency phonecards.

22. It was common for more than one phonecard machine to be placed by Sunlight and Phonecards in a single location. Often, as many as three machines operated simultaneously in a single convenience store. (Tr. 210-211; Defendants' Ex. 15). Under the contracts with DTL, a store having three machines was required to sell on average 2,959 phonecards per day. No actual sales data was presented to demonstrate such a market for emergency phonecards.

23. The two-minute phonecard was marketed as an "emergency" phonecard suggesting that it was available for use in emergencies. (Tr. 190-191). The two-minutes of

phone time would have logically limited its likely use to brief, emergency-type telephone calls.

24. In addition to Sunlight and Phonecards, DTL also leased 100 phonecard machines to a third company, C-Boys Ventures, for placement of the machines in convenience stores in South Carolina. The total machines leased to South Carolina companies for placement in the state were 326 machines. The contracts between DTL and all three companies required the purchase of 48 rolls of 7,500 phonecards per machine per year. Thus, the required sales by contract of phonecards in South Carolina for one calendar year was in excess of 117 million phonecards.(Wells Depo., pp. 61-63). Again, no information was submitted to the Court to substantiate that a reasonable market existed for 117 million emergency phonecards in South Carolina given its population of approximately four million.

25. A SLED agent did testify that he observed the phonecard machines in operation at one location. He observed unused phonecards discarded and left lying on the floor. (Tr. 250).

26. The long distance phone service provider for the emergency phonecards was Western Telecom. James M. McDaniel of the South Carolina Public Service Commission testified that Western Telecom was not authorized to provide intrastate telephone service in South Carolina. (Tr. 255-256).

27. Although the promotions of Sunlight and Phonecards were scheduled to last over 22 months in duration, the emergency phonecards being sold were only valid for six months. A representative of Diamond Games explained that the pin numbers purchased from Western Telecom for

all phonecards in a single promotion (regardless of the number of rolls involved) were activated when any single pin number in the promotion was first used by a consumer. (Hansen Depo., pp. 50-56). The phonecards stated "Valid for 6 months"; however, no information was provided to the consumer as to when the six month period began and ended. Because the promotion was scheduled to last much longer than six months, it was most probable that a large percentage of phonecards sold after the initial six months (or thereabouts) of the promotion would be invalid or expired. Neither Sunlight nor Phonecards were required to keep track or make reports of the pin numbers sold or remaining to be sold. The six months of service was activated regardless of whether the cards were sold. Moreover, many purchasers of phonecards within the initial six month period did not receive a full six months of service. By way of illustration, if the first pin number was used on March 1, 2000, then the millions of phonecards in the promotion would all expire by September 1, 2000. If a phonecard was purchased on August 1, 2000, then that phonecard would have only been valid for one month. Any phonecards purchased after September 1, 2000 would have never been valid.

II. CONCLUSIONS OF LAW

A. S.C. Code Ann. § 12-21-2710

The Defendants contend that the phonecard machines are prohibited gambling devices under S.C. Code Ann, 5 12-21-2710, which provides as follows:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or

> slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, **but the provisions of this section do not extend to ... vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.**

S.C. Code Ann. § 12-21-2710. (Emphasis added). The Plaintiffs contend, however, that the phonecard machines fall within the exception to the prohibition as set forth in the highlighted language above. The Plaintiffs argue that the phonecard machines are "vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance."

In *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995), the South Carolina Supreme Court ruled that a coin-operated "Lucky 8 Line" machine was an illegal slot machine under S.C. Code Ann. § 12-21-2710. The Court described the machine as follows:

> "Lucky 8 Line" is a coin-operated machine with a video display designed to simulate a slot machine. The player inserts money and presses a button. A computer program causes the screens to roll and randomly stop, displaying words and symbols. Certain combinations of symbols earn the player an additional turn. The player has absolutely no control over the combination of words or symbols appearing on the video screen.

453 S.E.2d at 897. That description of the "Lucky 8 Line" slot machine differs in only two ways from the phonecard machine at issue here: First, instead of a computer program within the machine randomly choosing the combinations of symbols, the pre-printing of the game pieces by computer program results in the random combination of symbols. There is no difference to the player of the machine. As with the "Lucky 8 Line" machine, the player has no control over the combination of symbols, and the winning combinations are pre-determined and not the result of any skill. Second, instead of earning a possible free play with the "Lucky 8 Line" machine, the player may earn cash prizes up to one million dollars.

In *State v. One Coin-Operated Video Game,* 321 S.C. 176, 467 S.E.2d 443 (1995), the South Carolina Supreme Court ruled a coin-operated "Cherry Master" machine to be an illegal slot machine under S.C. Code Ann. S 12-21-2710. The Court explained that the "Cherry Master" machine was "extremely similar" to the "Lucky 8 Line" machine previously declared illegal. The Court described the "Cherry Master" as follows:

> Like the Lucky 8 Lines, the Cherry Master is a coin-operated video machine in which the player inserts money and presses a button. The video screen displays images that rotate in separate

> independent vertical lines, slow, and then stop. If a combination of images matches horizontally, vertically, or, in some cases diagonally, the operator can be credited with free replays. The Cherry Master also has one or more "skill stop" buttons that permit the player to control the length of time the images rotate before stopping.

467 S.E.2d at 444.

This Court finds that the decisions in *Four Video Slot Machines* and *One Coin-Operated Video Game* are controlling on the issue before this Court. The phonecard machine is a coin-operated video machine in which the player places money and presses a button. The video display simulates a casino-style slot machine, with rolling or popping symbols, an 8-liner format, and visual and audio effects accompanying a winning ticket. The Plaintiffs do not dispute that the machine uses a "gambling motif" to attract and entertain players. The manufacturers' sales literature, in fact, describes the machine as simulating a slot machine. (Defendants' Ex. 2). Moreover, like a traditional slot machine, the player has no control over the ultimate outcome. Therefore, as was the case with the "Lucky 8 Line" and the "Cherry Master" machines, this Court concludes that the phonecard machines at issue are illegal slot machines under South Carolina law.

The Court further notes that the phonecard machines have numerous other components or features that are indicative of gambling devices and net vending machines as the Plaintiffs suggest. The Plaintiffs maintain that the machine lacks a random number generator which, according to the Plaintiffs' expert, is used "to select the icons or symbols that will appear on the

screen." (Tr. 124). However, the lack of a random number generator located physically within the machine is immaterial. It is the random selection of the icons and of the winning combinations that is critical. That requisite randomness is present and results from the process used in printing the rolls of phonecards. Robert Sertell, the Defendants' expert, explains:

> We've heard testimony so far that the machines do not have a random number generator located within the machine itself and that's correct. They don't need one because the randomness is imparted at the printing plant by the printing process. So the random distribution on the rolls of tickets serves the same function. It imparts the random feature or the unpredictability of the outcome to the game that a traditional Caesar's Palace slot machine would have.

(Tr. 281).

A traditional slot machine will also be set up to return a particular house percentage or hold, which represents the amount of net profit. Similar to a Slot machine, the phonecard machine through the pre-printed rolls of phonecards also establishes a hold amount or net profit. (Tr. 283-285). A vending machine has no such feature. The phonecards at issue were printed with a 30% hold, meaning that 70% of the gross revenue is returned to the player as prize money.

The experts also agreed that a common feature of a gambling device is a lock-out or lock-up feature. (Tr. 144, 291-292). That feature locks-up or freezes the operation of the machine when a pre-determined level of prize money is won, thereby requiring an attendant to verify the prize. (Tr. 141). The lock-up amount may be set at any amount.

the Lucky Shamrock Phonecard Manual showed a lock-up amount of $1,000. (Tr. 144). A lock-up feature is not consistent with a vending machine. (Tr. 292).

The phonecard machine also contains two hard meters, one to record money taken into the machine and the other recording prize money paid out.[3] A vending machine typically has only one hard meter which would record money taken into the machine. (Tr. 293). The experts agreed that the existence of a hard meter reflecting prize money won is consistent with a slot machine. (Tr. 148, 292-293).

The phonecard machines also have a "locking brain box compartment" where the microprocessor for the unit is housed for security. A slot machine has such a feature, while a vending machine does not. (Tr. 297-298). Additionally, the phonecard machines may be linked, which is common for slot machines and not vending machines. (Tr. 298-299). As indicated, many of these features are common to a gambling devices [sic] and not a vending machine, leading this Court to conclude that the phonecard machines are not vending machines.

In arguing that the phonecard machines are not gambling devices, the Plaintiffs contend that the machine dispenses a consumer product, i.e., the two-minute emergency phonecard, in addition to dispensing a promotional games piece. The Plaintiffs contend that the game piece is no different than any other promotional game provided in conjunction with the sale of a consumer product. This Court disagrees. The differences are substantial and have

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[3] The second hard meter was labeled "WON." (Tr. 294).

been recognized by other jurisdictions where courts have concluded that phonecard machines similar to those at issue are gambling devices.

First and foremost, the "sweepstakes" at issue is a permanent, high-stakes game with payouts of 70% or higher. This is readily distinguishable from a low-stakes, temporary game that promotes such products as soft drinks, candy and fast-food. Where the prize payout is as high as 70%, there is greater the likelihood that the consumer is purchasing the product to participate in the game than to utilize the product. This is particularly true where the odds of winning a substantial prize are quite low. This point is made by comparing the odds to win a $100 prize in the different contests in evidence:

Phonecards R Us	1:2,828
Sunlight Tel.	1:6,052
M&M's	1:3,001,000

(Defendants' Ex. 5, 6, and 19). A consumer is less likely to purchase a package of M & M's solely to obtain a chance to win. However, it is more likely that that is the motivation for a purchaser of a phonecard.

The evidence demonstrates that the manufacturer and seller of the phonecards, including the Plaintiffs, understand that they are not truly selling a consumer product but rather the participation in a game of chance. To illustrate, the record includes a pro forma for Sunlight which reflects a promotion consisting of 1,856 rolls with 7,500 phonecards on each roll. (Defendants' Ex. 10). The gross revenue for the promotion is $13,920,000 which is determined based on the $1 sale of each of the 13,920,000 games pieces. The pro forma reflects a prize percentage of

70%, which equates to $9,744,000 in prize money. The net revenue is then stated as $4,176,000. There is no accounting on this pro forma for the costs of producing the phonecards or the cost of the telephone time, i.e., the alleged consumer product. Instead, this pro forma reflects clearly to this Court that the product sold is intended to be the game piece. The only cost of business deducted from the gross revenue is the prize money itself.

The trial testimony of Dan Durbin further supports the Court's conclusion. Mr. Durbin testified that Phonecards agreed by written contract to purchase four rolls of 7,500 phonecards per month per leased machine in the year January 1, 2000 through January 1, 2001. Phonecards agreed to purchase and presumably sell in 36 stores a total of 36 million phonecards in one calendar year. In certain stores, Phonecards placed as many as three machines. Those stores were required by contract to sell 1,080,000 phonecards, which equates to 2,959 phonecards per day for an entire calendar year.[4] Neither the Plaintiffs nor DTL nor Diamond Games did any marketing study that would demonstrate the demand for two-minute emergency phonecards in areas served by the Plaintiffs' stores. Given the population of South Carolina, this Court is not convinced that there was a reasonable market of that magnitude for two-minute emergency phonecards.[5]

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[4] Mr. Durbin even conceded that the market did not support the sale of 3,000 phonecards per day per store. (Tr. 212).

[5] In actuality, DTL had leased 326 phonecard machines to be located in South Carolina. The leases were issued to three different companies, the two Plaintiff companies and C-Boys Ventures. The contracts with the three companies all required the purchase of 48 rolls of 7,500 phonecards per machine per year. The required sales by

(Continued on following page)

Instead, the product being sold to consumers was a game of chance, i.e., the participation in a high-stakes game of chance with a high payout rate.[6]

Furthermore, the fact that many of the Plaintiffs' stores had more than one machine also supports a conclusion that the product sold was a game of chance. No evidence was presented to demonstrate that the demand of emergency phonecards was so great that one dispenser could not satisfy the demand in one location. A SLED agent testified that he observed unused emergency phonecards, presumably "nonwinners," left lying about on the floor. (Tr. 250). This Court concludes that the placement of multiple machines in one location demonstrates that the machines sold a game of chance where consumers were encouraged to play the machines repeatedly. The fact that the bill-acceptor on the phonecard machine accepts denominations as high as a $100 bill without furnishing any change further supports the conclusion that emergency phonecards were not the "product" being sold. (Tr. 269).

In addition, the Defendants raised numerous questions as to whether the emergency phonecards purchased by the consumer provided valid phone service throughout the course of the promotion.[7] Evidence was presented that

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contract, therefore, were in excess of 117 million emergency phonecards in South Carolina for one calendar year. (Wells Depo. pp. 61-63).

[6] No evidence was presented as to the number of emergency phonecards where the phone time was actually used by consumers. In fact, there was testimony that neither the Plaintiffs nor DTL nor Diamond Games kept any records of the phone time used. (Wells Depo., pp. 54-55).

[7] There was also a question raised as to whether the phone service in South Carolina was even legitimate. James M. McDaniel of the South Carolina Public Service Commission testified that Western

(Continued on following page)

the emergency phonecards were only valid for a period of six months; yet, the consumer was not informed as to when the six month period commenced. A representative of Diamond Games explained that the six month period commenced when the first pin number in a promotion was used regardless of the number of rolls in such a promotion. (Hansen Depo., pp. 50-56). The Plaintiffs' promotions were scheduled, however, to last 22 and 23 months respectively, with hundreds of rolls to be sold as part of each promotion. (Tr. 179-180, 213). Therefore, it is reasonable to conclude that the first pin number would have been used shortly after the promotion began and hence, all pin numbers would then expire within six months and long before the scheduled end of the promotion. It is most probable that any phonecards purchased after that initial six month period would be invalid. Once the phonecards had expired, there is no question that the Plaintiffs would be selling only the game pieces. Given that scenario, even the Plaintiffs' expert witness agreed that a consumer was only buying a game of chance:

> Q. – I'm asking you to assume that the phone card is worthless, that it's expired, it cannot be used –
>
> A. Yes.
>
> Q. – Any of those scenarios and you still go to a machine and it dispenses that ticket, what you – would you agree with me that what you have purchased is a game of chance and only a game of chance?

Telecom, the provider of the telephone service, was not authorized to provide intrastate telephone service in South Carolina. (Tr. 255-256).

A. Yes.

Q. And that's gambling?

A. Based – depending on state statute, but, yes, I agree with you.

(Tr. 157-158).

The Plaintiffs further contend that the element of consideration is not present because no purchase was necessary in order to obtain a game piece. The Plaintiffs point to the availability of a free game piece by sending a written request to the company headquarters. This limited availability of a free game piece does not exempt the phonecard machine under S.C. Code Ann. § 12-21-2710. It does not simply convert an illegal gambling device into a legal device. *See, Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234, 239 (N.D. 2001) ("the limited availability of free play does not exempt the Lucky Strike game from being defined as gambling"). There are two additional points worth noting. First, there is no evidence that any free game pieces were ever requested. In response to an interrogatory, Phonecards admitted that no free game pieces were requested or distributed. (Tr. 237-238). Second, the Plaintiffs did not provide a free play of the phonecard machine but only offered a free game piece by mail. Both the Plaintiffs' expert as well as Dan Durbin admitted that playing the machine had an entertainment or amusement value. (Tr. 151, 197). However, as both witnesses also conceded, that entertainment or amusement value associated with playing the game of chance on the machine could only be achieved by the payment of consideration, namely the one dollar per play. The Plaintiffs did not provide any free plays of the phonecard machines. (Tr. 151-152, 197-198).

Other jurisdictions have previously addressed the legality of these identical phonecard machines. In *Midwestern Enterprises, Inc.* v. *Stenehjem*, 625 N.W.2d 234 (N.D. 2001), the North Dakota Supreme Court ruled a "Lucky Strike" machine that dispensed two-minute phonecards to be an illegal gambling device under North Dakota law. The North Dakota court rejected the argument that the machine is a bona fide vending machine that dispenses a product containing a promotional sweepstakes. The court noted that this comparison fails "because the Lucky Strike game is very different from a low pay-out, temporary promotion," 625 N.W.2d at 241. The court further explained that the phonecard machine incorporates "gambling features," including visual and audio effects, a 65% payout rate, and the acceptance of larger denominations of bills (up to $20) for a one dollar item without giving change.

In *Mississippi Gaming Commission v. Six. Electronic, Video Gambling Devices*, 2001 WL 569988 (Miss. App. 2001) the Mississippi Court of Appeals ruled that a Lucky Shamrock machine, which appears identical to those at issue here, was an illegal slot machine under Mississippi law. Like the Plaintiffs in the present case, the owner of the phonecard machine argued that its sweepstakes is no different from any other promotional sweepstakes. The court discussed certain characteristics as "relevant considerations in determining whether a device is a slot machine intended to encourage gambling or instead is a product dispenser with a sales promotion." 2001 WL 569988, *7. For example, the court discussed "that soft drink and other product promotions usually are limited in time and have dubious enough odds of winning significant prizes

that winning is only an incidental reason for purchasing the merchandise." 2001 WL 569988, *6.

In *Black North Associates, Inc. v. Kelly*, 722 N.Y.S.2d 666 (N.Y. Sup. Ct. 2001), a New York appellate court ruled that a Lucky Shamrock machine, also, which appears identical to those at issue here, was an illegal slot machine under New York law. The court explained that the phone-card machine "was designed to resemble a slot machine, and for all intents and purposes it operates as a slot machine." 722 N.Y.S.2d at 667. The court rejected the contention that the sweepstakes was not a gambling activity because "no purchase was necessary":

> Here, the evidence establishes that, while the distribution of free promotional games pieces was limited to one per person per day "while supplies last," players of the Lucky Shamrock vending machine could increase their chances of winning by making multiple purchases. Indeed, the machine was designed, to encourage such multiple purchases, since it accepted bills ranging from $1 to $20 and it did not give change.

Id. The court also noted that the machine was "not a passive dispensing device; rather it is an active machine that permits the player to watch the game being played, know that he has a winning ticket prior to opening the ticket and in fact, only use the ticket as a receipt for redemption." *Id.*[8]

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[8] *See also, People ex re. Lockyer v. Pacific Gaming Technologies*, 82 Cal. App. 4th 699, 98 Cal. Rptr. 2d 400 (2 Dist. 2000); *Major Manufacturing Corp. v. Dept. of Revenue*, 168 Pa. Cmwlth. 577, 651 A.2d 204 (1995).

In sum, this Court concludes that the phonecard machines are slot machines illegal under S.C. Code Ann. § 12-21-2710.The Plaintiffs have failed to prove that the phonecard machines fall within the exception to S.C. Code Ann. § 12-21-2710. The phonecard machine is not a traditional "vending machine," does not always give a uniform and fair return in value, and, without dispute, there is present an element of chance involved to each player of the machine.

This Court further concludes that the rolls of phonecards themselves are illegal under S.C. Code Ann. § 12-21-2710. The experts agreed that the roll of phonecards is an integral and necessary part of the machine.[9] The machines cannot operate without the roll of phonecards. (Tr. 152, 280, 311). It is no different than any other component part that makes the machine function as a gambling device. Therefore, this Court concludes that, as an integral part of the illegal device, the rolls of phonecards themselves are deemed illegal under South Carolina law.

Moreover, S.C. Code Ann. § 12-21-2710 declares illegal "any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols." *See*, S.C. Code Ann. § 12-21-2710. The phonecard itself, containing the game of chance, is a pull-tab which displays different symbols of which there are certain winning combinations. The pull-tab is a recognized gambling device. (Tr. 265-266). It is functionally the

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[9] *See, Mississippi Gaming Commission v. Six Electronic Video Gambling Devices*, 2001 WL 569988, *6 (Miss. App. 2001) (phonecards are "an integral and not just incidental factor in deciding that this is a slot machine").

same device as a pull board or punch board. (Tr. 266). Therefore, independent from the phonecard machine, the rolls of phonecards are illegal under S.C. Code Ann. § 12-21-2710.

B. S.C. Code Ann. § 12-22-1040

The Defendants further contend that the phonecard machines are in violation of S.C. Code Ann. § 12-22-1040, which provides: "A machine must not simulate bingo or a slot machine." It is undisputed that the phonecard machines, at the very least, simulate a slot machine. The Plaintiffs" expert testified as follows:

> Q. Now, you would agree with me, would you not, that the machines, what appears on the video screen is designed to simulate a slot machine?
>
> A. It's certainly a gambling theme, yes.
>
> * * *
>
> Q. And it's designed to simulate a slot machine for the attraction that it provides?
>
> A. I think so, yes.

(Tr. 153-154). Dan Durbin also testified that the visual and audio effects simulate a slot machine. (Tr. 197). Therefore, if S.C. Code Ann. § 12-22-1040 is applicable, then the phonecard machines are in violation of that statute.

S.C. Code Ann. § 12-22-1040 was enacted as part of 1999 Act 125. In *Joytime Distributors and Amusement Co., Inc. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999), the South Carolina Supreme Court declared unconstitutional Part II of Act 125, which provides for a referendum on the

continued legality of video game payouts after June 30, 2000. However, the Court ruled that Part II was severable from the remainder of Act 125. The Court further explained that "[s]ince Part II of Act 125 is invalid, those portions of Part III of the Act which provide for the regulation of the video gaming industry, contingent upon the referendum called for in Part II, are also invalid." 528 S.E.2d at 657.

S.C. Code Ann. § 12-22-1040 was enacted as part of Part III of Act 125. The Plaintiffs, therefore, argue that S.C. Code Ann. § 12-22-1040 was repealed by implication. The Defendants, however, maintain that S.C. Code Ann. § 12-22-1040 is not contingent upon the referendum and, therefore, is severable.

The Court finds that it is not necessary to address whether S.C. Code Ann. § 12-22-1040 was repealed by implication.[10] There is no question that S.C. Code Ann. § 12-22-1040 was enacted and was valid at least from July 1, 1999 through July 1, 2000.[11] Act 125 includes a "savings clause" which provides as follows:

> The repeal or amendment by this act of any law, whether temporary or permanent, or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended

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[10] The Court is aware that repeals by implication are disfavored. *See, Justice v. The Pantry*, 330 S.C. 37, 496 S.E.2d 871, 874 (Ct. App. 1998).

[11] Act 125 provides that Article 9 of Chapter 22, Title 12, which includes S.C. Code Ann. § 12-22-1040, took effect on July 1, 1999.

> provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

1999 Act 125, § 21.

Sunlight filed its complaint in this action on April 20, 2000, and Phonecards filed its complaint on April 21, 2000. Both complaints allege that SLED confiscated the phonecard machines and phonecards at issue in March 2000. The Court, therefore, finds that S.C. Code Ann. § 12-22-1040 was a valid statutory provision on the dates that any civil or criminal liability attached. The "savings clause" requires that S.C. Code Ann. § 12-22-1040 be applied to this litigation.

As discussed above, it is undisputed that the phonecard machines at the very least simulate a slot machine. This Court accordingly rules that the phonecard machines at issue are in violation of S.C. Code Ann. § 12-22-1040.[12]

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[12] The Defendants have also argued that S.C. Code Ann. § 12-22-1040 simply codifies the holdings of the South Carolina Supreme Court in *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995), and *State v. One Coin-Operated Video Game*, 321 S.C. 175, 467 S.E.2d 443 (1995). This Court agrees. As discussed above, in those cases, the Supreme Court found that coin-operated video machines that simulated slot machines were illegal under South Carolina law. S.C. Code Ann. § 12-22-1040 had not been enacted and played no role in those decisions. Thus, a similar finding of illegality should result in the

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III. ORDER

IT IS, THEREFORE, ORDERED AND DECLARED that the Lucky Shamrock phonecard machines and phonecards manufactured by Diamond Games and leased and/or sold to Sunlight Prepaid Phonecard Company, Inc., Phonecards R Us, Inc., and R.L. Jordan Oil Company of North Carolina, Inc. are illegal gambling devices under S.C. Code Ann. § 12-21-2710.

IT IS FURTHER ORDERED AND DECLARED that the Lucky Shamrock phonecard machines and phonecards manufactured by Diamond Games and leased and/or sold, to Sunlight Prepaid Phonecard Company, Inc., Phonecards R Us, Inc., and R.L. Jordan Oil Company of North Carolina, Inc. are illegal gambling devices under S.C. Code Ann. § 12-22-1040.

AND IT IS SO ORDERED.

/s/ L. Casey Manning
L. CASEY MANNING
Fifth Judicial Circuit

Columbia, South Carolina
January 7, 2002

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present case regardless of whether S.C. Code Ann. § 12-22-1040 is applicable or even valid.

[LOGO]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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August 19, 2004

Matthew A. Henderson, Esquire
Joshua M. Henderson, Esquire
Henderson Brandt & Vieth
360 East Henry St.
Spartanburg, SC 29302

Re: Sun Light Prepaid v. State of SC

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

Justice John H. Waller, Jr., and Justice E.C. Burnett, III, not participating.

I would grant rehearing.

s/ Costa M. Pleicones J.

August 19, 2004."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ Daniel E. Shearouse BS
CLERK

DES/jjp

cc: Assistant Attorney General Elizabeth R. McMahon
William H. Davidson, II, Esquire
Andrew Lindemann, Esquire
W. Hogan Brown, Esquire
Carl W. Stent, Esquire
David M. Barden, Esquire